

“Treatment as State”

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Indian Self-Determination and Educational Assistance Act

- * Concept of tribes carrying out federal functions originated with the Indian Self-Determination and Education Assistance Act (ISDEAA) passed in 1975
- * Under the ISDEAA a tribe can “contract” with the Bureau of Indian Affairs and Indian Health Services for particular federal Indian programs, services, functions, and activities that either agency provides to tribes.
- * Contracts are known as “638 contracts”

638 Contracting

- * The theory behind the law is that tribes can do a better job in administering a federal program than a the federal agency;
- * Administering federally funded programs will also promote, enhance and support tribal self-determination;
- * Today virtually all tribes contract with the BIA for funding to administer the tribal government.

638 Contracting

- * Other 638 contracting services:
 - * Schools
 - * Indian Child Welfare services
 - * Fire Protection
 - * Realty Services
 - * Law enforcement (not in PL 280 states CA)
 - * Tribal court services (not in PL 280 states CA)

Tribal Self-Governance

- * The ISDEAA was amended in 1987 to expand upon the 638 contracting process;
- * The amendment authorized a new Title III “Indian Self-Governance Demonstration Project” within the BIA and it was later expanded to IHS;
- * Instead of individual programs being contracted for, a tribe could acquire the funding of all federal Indian programs, services, functions, and activities and reprogram and reallocate the funds once funding was received;
- * Compacts instead of contracts are used.

Tribal Self-Governance

- * The demonstration project was ultimately made permanent by passage of the Tribal Self-Governance Act which amended the ISDEAA in 1994 and added Title IV.
- * The Tribal Self-Governance Act brought greater program flexibility and less federal oversight;
- * Allows tribes to contract for non-BIA programs within the Department of Interior (NPS, BLM, Fish and Wildlife, Bureau of Reclamation...)

Tribal Self-Governance

- * There are some limitation on contracting for non-BIA programs:
 - * If the program is “for the benefit of Indians because of their status as Indians, a tribe shall be able to contract for the program
 - * If the program is of special geographic, historical or cultural significance to the participating tribe it may be subject to contracting, but at the discretion of the federal agency.

Self-Governance and Other Federal Agencies

- * In 2015 Congress passed the Fixing America's Surface Transportation Act (FAST Act);
- * The act contains a Tribal Transportation Self-Governance Program which expanded the ISDEAA to the Department of Transportation (DOT);
- * Tribes can compact with the DOT for federal transportation funding for tribal roads and highways on tribal lands.

Federal Environmental Laws a Different Approach

- * Several federal environmental laws authorize Environmental Protection Agency (EPA) to treat eligible federally recognized Indian tribes in “a similar manner as a state” for implementing and managing certain environmental programs.
 - * The Clean Air Act (CAA);
 - * Clean Water Act (CWA); and
 - * Safe Drinking Water Act (SDWA.)
- * **expressly** provide for Indian tribes to play essentially the same role in Indian country that states do within state lands.

Federal Environmental Laws a Different Approach

- * Eleven federal statutes that tribes can seek program management or operation under.
- * Many statutes are silent on the role of tribes. But EPA has interpreted such acts to authorize tribal participation:
 - * Toxic Substances Control Act; and
 - * Emergency Planning and Community Right to Know Act.

Federal Environmental Laws a Different Approach

- * Other statutory provisions in federal laws provide **opportunities** for tribes.
 - * Comprehensive Environmental Response, Compensation and Liability Act, Section 126(a) states that tribes shall be given “substantially” the same treatment as a state.
 - * Similarly, Section 23 of Federal Insecticide, Fungicide, and Rodenticide Act authorizes EPA to enter into cooperative agreements with Indian tribes for specific purposes under the Act.

Treatment as a State CAA

- * Passed in 1970's the CAA authorized states to implement the Act;
- * In 1990 the CAA was amended to allow tribes to participate in the implementation of the CAA;
- * 1998 EPA issued the “Tribal Authorization Rule” (TAR) that set out the eligibility requirements for tribes to be “treated in the same manner as states” for purposes of managing a CAA program.

Treatment as a State CWA

- * Essentially passed in 1972 but amended in 1987 to add provision for the tribes to be treated similarly to states;
- * 1991-EPA issued its “treatment as a state” regulations and policy

TAS-----First Steps

- * Define the environmental problem;
- * Determine what EPA program that can assist with eliminating or managing the problem;
- * Does the EPA program require TAS authorization before the tribe can assume management of the program;
- * Understand your capacity to administer the program.

TAS Application

- * If the tribe needs TAS approval for the EPA program there are 4 requirements that must be demonstrated:
 - * Tribe is federally recognized;
 - * Has a governing body carrying out substantial governmental duties and powers;
 - * Ability to implementing the program consistent with the federal Act and applicable regulations;
 - * Ability to identify the exterior boundaries of the reservation and, for non-reservation areas, to demonstrate the basis for jurisdiction.

Federally Recognized

- * Fairly easy showing—submit BIA list of federally recognized tribes that shows the tribe is listed;
- * The BIA list is updated periodically and published in the Federal Register;
- * Just Google it.

Functioning Government

- * Requires showing how the tribe is organized and operates;
 - * Submission of tribe's Constitution, Articles, etc.
 - * Who is eligible to vote, is there a Tribal Council, Business Committee, Tribal Officers, etc.
 - * What body within the organizational structure has authority to oversee government functions (Tribal Council, General Council, etc.)

Tribal Authority and Jurisdiction Over Reservation

- * When and how the reservation was established (Executive order, congressional act, fee-to-trust acquisition, etc.);
- * Need maps, surveys, legal description etc. of the reservation;
- * Identify other tribal lands held in trust but may not be contiguous ;
- * Identify if there are non-Indian fee lands within the reservation;
- * Legal opinion letter from tribal attorney addressing authority and jurisdiction.

Tribal Authority and Jurisdiction Over Reservation

- * Attorney letter:
 - * 2016 EPA issued a “*Revised Interpretation of CWA Tribal Provision*”
 - * Reaffirmed that tribes have inherent authority to regulated water resources;
 - * Section 518 of CWA is a congressional delegation of tribal authority to regulate water resources within the boundaries of the reservation or on tribal lands held in trust.

Tribal Authority and Jurisdiction Over Non-Indian Lands on Reservation

- * Significant change is tribal regulation over non-Indians within the boundaries of the reservation;
- * Previously tribes had to demonstrate that they had authority to regulate non-Indian land owners within the reservation because:
 - * The non-Indian consented to the regulations; or
 - * The non-Indian's conduct or activities on their lands would threaten to the health, safety, welfare, or economic integrity of tribe. (*Montana* test)

Tribal Authority and Jurisdiction Over Non-Indian Lands on Reservation

- * EPA has now dropped the requirements of the *Montana* test;
- * Attorney letter need only cite to the tribe's inherent authority and congressional delegation of authority under the CWA.

Administrative Capability or Capacity

- * KEY Section
- * Begin with current programs the tribe is administering;
- * Why the tribe needs the program (problem or situation calling for tribal regulation);
- * Who and how the program being sought will be administered;
 - * Staffing,
 - * Expertise,
 - * Equipment needed or used,
 - * Outside resources that will be used.

Submitted to EPA for Approval

- * Application will be submitted to EPA Regional office for approval;
- * EPA will request comments on the application from state, local and tribal governments;
- * If there are comments or objection tribe generally is the one to respond;
- * Additional documents requested to address issues raised by EPA.

Once TAS Approved

- * Work with EPA in implementing the new program;
- * Key Point---
 - * Once you have been approved for TAS status under a particular environmental law (i.e. CWA, CCA, etc.) you do not have to re-submit a whole new TAS application addressing all 4 requirements (assuming nothing has changed) only the capacity section to take on the new program sought.

Funding for the Program

- * Remember the Tribal Self-Governance approach for BIA, IHS and DOT—
- * EPA does not provide direct funding for the program the tribe is approved to administer and operate
- * Grant funding is available depending on program assumed
- * Tribes are pushing for a Tribal Self-Governance contracting or compacting policy with EPA.